

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LESTER TOM,  
Plaintiff,

v.

UNITED AIRLINES, INC., et al.,  
Defendants.

Case No. 15-cv-00466-VC

**AMENDED ORDER<sup>1</sup> DISMISSING  
CLAIMS WITH LEAVE TO AMEND**

Re: Dkt. No. 19

The court issued an order to show cause why the plaintiff's claims relating to unposted positions should not be dismissed for failure to state a claim. After receiving briefs on this question and holding a hearing, the court concludes that the complaint fails to state a claim for race discrimination with respect to the unposted positions. As the plaintiff concedes in his brief, to prevail on a claim that he was denied an unposted position because of his race, he must show that he "indicated to the employer" an interest in being promoted to a particular position, or to a class of positions that includes that particular position. Plaintiff's Response at 3 (quoting *Mauro v. S. New England Telecomm., Inc.*, 208 F.3d 384 (2d Cir. 2000)). See also Defendants' Response at 5 ("Where the promotions are not posted, there must be, at minimum, some factual allegations that reflect an attempt to obtain an identifiable position, such as a clear expression of interest to the decisionmaker."). As explained in the order to show cause, and in the defendants' brief, and at the hearing, the complaint does not do this.

Accordingly, the claims relating to unposted positions are dismissed. Although this is the Fifth Amended Complaint, given the unusual procedural background of this case, the plaintiff will be given one more opportunity to amend the complaint to sufficiently allege that the defendants

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<sup>1</sup> This order amends the order issued May 22, 2015 to clarify that only the claims relating to unposted positions have been dismissed, not the claims relating to posted positions.

discriminated against him personally with respect to unposted positions. Any amended complaint must be filed by June 12, 2015. A case management conference will take place June 23, 2015 at 10:00 a.m.

**IT IS SO ORDERED.**

Dated: June 11, 2015



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VINCE CHHABRIA  
United States District Judge